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No. 94-1093

In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTHEAST UTILITIES SERVICES CORPORATION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S, INTERNATIONAL BROTHERHOOD of ELECTRICAL WORKERS, LOCAL 455, AFL-CIO-CLC, BRIEF IN OPPOSITION

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International Brotherhood of Electrical Workers, Local 455, AFL-CIO-CLC, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the First Circuit.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict With The Decisions Of This Court.

Petitioner claims that the decision below was contrary to the opinions of this court with respect to managerial and supervisory status under the National Labor Relations Act. In support of this conclusion, Petitioner relies upon this Court's opinions in *NLRB* v. *Health Care & Retirement Corp. of America*, __ U.S. __, 114 S.Ct. 1778, (1994) and *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980). In *Health Care*, this Court determined whether certain nurses were employed as "Supervisors" as defined under 29 U.S.C. section 152(11) of the National Labor Relations Act. Similarly in *Yeshiva*, this Court discussed the applicability of a judicially implied exclusion to the act for "managerial employees." The lower Court's decision was completely consistent with these opinions.

In order to qualify as a Supervisor within the meaning of section 2(11), an employee must possess one of twelve (12) specifically enumerated powers. He must also exercise such authority by the "use of independent judgment" and "in the interest of the employer." *NLRB* v. *Health Care & Retirement Corp. of America*, __ U.S. __, 114 S.Ct. 1778, 1780 (1994) Petitioner claims that PCs and SPCs "responsibly direct" other employees by the "use of independent judgment" and "in the interest of the employer" and thus qualify as "Supervisors" within the meaning of section 2(11). While the lower court conceded that PCs and SPCs exercised independent judgment in the interest of the employer, the court did not agree with petitioner's contention that they "responsibly direct" other employees.

Although this Court has never directly defined the term "responsibly direct" it did acknowledge in *Healthcare* that terms such as "independent judgment" and "responsibly direct" are ambiguous and the Board must therefore be given "ample room to apply them to different categories of employees." *NLRB* v. *Healthcare*, __ U.S. __, 114 S.Ct. 1778, 1783 (1994) Similarly, this Court in *Yeshiva* acknowledges that Courts will accord the Board deference so long as its "conclusions are rationally based on articulated facts and consistent with the Act." 444 U.S. 672, 691 (1980). The lower Court embraced this notion when it stated "we are especially deferential to the Board's determination of Supervisory status because we recognize the Board's competence and experience in applying the Act to the complexities of Industrial Life." (App. A7). In light of this wide latitude granted to the Board, the lower Court's decision with respect to Supervisory status was clearly consistent with the prior decisions of this Court.

The lower Court also correctly concluded that PCs and SPCs do not qualify for "Managerial" status. In *Yeshiva*, this Court noted that "Managerial employees" are defined as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB* v. *Yeshiva University*, 444 U.S. 681 (1980) quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-89, 94 S.Ct. 1757, 1766-69, 40 L.Ed. 2d 134 (1974). Employees will establish Managerial status "only if they represent Management interests by taking and recommending discretionary actions that effectively control or implement employer policy" (*Ibid.* at 683).

Petitioner maintains that the lower Court violated *Yeshiva* because "whether to proceed with scheduled power outages as well as how to react to emergency losses of generation could not be more central to the implementation of NEPEX Policy and purpose." (pet. brief p. 11) The lower Court correctly rejected Petitioner's argument particularly in light of the fact

that "management policy at NEPEX is embodied in the operating procedures formulated by the operations committee" (App. A. 10). Consequently, PCs and SPCs have no role in the creation or implementation of operating procedures. Additionally, the Court failed to find the kind of "congruence of interest" in the present case, which formed the basis for Management status in *Yeshiva*. The lower Court's decision is therefore completely consistent with this Court's prior decisions.

II. There Is No Conflict With The Decisions Of Other Circuit Courts Of Appeals.

The lower Court's decision is consistent with those Circuit Courts which have addressed the issue in this case. As stated above, the only issue with respect to supervisory status pursuant to section 2(11) is whether the PCs and SPCs "responsibly direct" other employees. In *Ohio Power*, the 6th Circuit held that "to be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and integrity and is implied power." *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 998 U.S. 899, 70 S.Ct. 299, 94 L.Ed. 553 (1949) This definition was later adopted by the 1st Circuit in *Maine Yankee. Maine Yankee Atomic, Etc.* v. *NLRB*, 624 F.2d 347, 361 (1980) Petitioner conveniently overlooks these prominent Circuit Court cases and instead elects to redefine the issue by contending that "individuals in positions *nearly identical* to those in dispute here were neither Supevisors or Managers." (Emphasis added) (Pet. Brief p. 8) Unfortunately, this statement does not contemplate the fact that the cases relied upon by Petitioner do not address the narrow question of whether the PCs and SPCs "responsibly direct" other employees.

Consistent with *Maine Yankee* and *Ohio Power* the lower Court found that "PCs and SPCs are not answerable for the

conduct of satellite operators" nor is there any "evidence that they answer for engineering or equipment failures." (App. A8) Consequently, the decision of the lower Court was consistent with other Circuit Court decisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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